(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

DATE: AUG 0 2 2013 OFFICE: NEBRASKA SERVICE CENTER

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a computer software and hardware development company. It seeks to employ the beneficiary permanently in the United States as a systems administrator pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to aliens of exceptional ability and members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, an ETA Form 9089 Application for Permanent Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had failed to establish that the beneficiary possessed the employment experience required on the ETA Form 9089 and denied the petition accordingly.

On appeal, the petitioner, through counsel, asserts that the petitioner established that the beneficiary met the experience requirement set forth on the ETA Form 9089.

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).[1]

Section 203(b) of the Act states in relevant part that:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. --
>
> > (A) In general. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.[2]

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[1] The procedural history of this case is documented in the record and is incorporated herein. Further references to the procedural history will only be made as necessary. The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal. The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

[2] There is no indication in this case that the petitioner is requesting a visa based on the beneficiary as an alien of exceptional ability. Further, the ETA Form 9089 replaced the Form ETA 750 after new DOL regulations went into effect on March 28, 2005. The new regulations are referred to by DOL by the acronym PERM. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004).

The regulation at 8 C.F.R. § 204.5(k)(2) defines an advanced degree as follows:

> [A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate degree or a foreign equivalent degree.

U.S. Citizenship and Immigration Services (USCIS) may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also*, *Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *See generally Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification application form]." *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

Here, the Form I-140 was filed on September 19, 2012. On Part 2.d. of the Form I-140, the petitioner indicated that it was filing the petition for a member of the professions holding an advanced degree or an alien of exceptional ability.

The petitioner must establish that the beneficiary has all the education, training, and experience specified on the labor certification as of the petition's priority date, the day the ETA Form 9089 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d); Matter *of Wing's Tea House,* 16 I&N Dec. 158 (Act. Reg. Comm. 1971). Here, as noted above, the ETA Form 9089 was accepted for processing on May 17, 2012, which establishes the priority date.

The ETA Form 9089 in this matter is certified by DOL. DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone

unnoticed by federal circuit courts. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

Rather, the AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.,* 817 F.2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS,* 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd* 273 F.3d 874 (9th Cir. 2001).

Relying in part on *Madany*, 696 F.2d at 1008, the U.S. Federal Court of Appeals for the Ninth Circuit (Ninth Circuit) stated:

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

> The labor certification made by the Secretary of Labor ... pursuant to section 212(a)[(5)] of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.,* 699 F.2d at 1006, revisited this issue, stating: "The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer." *Tongatapu,* 736 F. 2d at 1309.

The proffered position's requirements are found on ETA Form 9089 Part H. This section of the application for alien labor certification, "Job Opportunity Information," describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole. The instructions for the ETA Form 9089, Part H, provide:

> ***Minimum Education, Training, and Experience Required to Perform the Job Duties.*** Do not duplicate the time requirements. For example, time required in training should not also be listed in education or experience. Indicate whether months

> or years are required. Do not include restrictive requirements which are not actual business necessities for performance on the job and which would limit consideration of otherwise qualified U.S. workers.

On Part H.11 of the ETA Form 9089, the description of the job duties for a systems administrator provides:

> Responsible for providing senior engineering leadership on all design and standards issues including analysis, development, implementation, as well as training and mentoring of technologies. Duties include developing and utilizing knowledge of design criteria for initiating components and load distribution, local area network (LAN) and wide area network architecture and support; participating and leading the installation and/or changes of servers and devices using tools and methodologies of the group; participating in implementation teams to integrate new network designs into production with minimal impact to online operations; interfacing with software developers, fellow systems administrators as well as senior networking engineers; developing written procedures, engineering drawings, and other technical documentation; coordinate and direct interface, coordination and development with Apple business groups and external partners; coordinate and direct preventative maintenance of all major communications systems components; mentor junior engineers and peer teams as required. Position requires 24/7 duty pager rotation for up to one week per month.

Regarding the minimum level of education and experience required for the proffered position in this matter, Part H of the labor certification reflects the following requirements:

H.4. Education: Minimum level required: Bachelor's

4-A. States "if other indicated in question 4 [in relation to the minimum education], specify the education required."

n/a

4-B. Major Field Study: Computer Science, Engineering or related field.

7. Is there an alternate field of study that is acceptable.

The petitioner checked "no" to this question.

7-A. If Yes, specify the major field of study:

n/a.

8. Is there an alternate combination of education and experience that is acceptable?

The petitioner checked "no" to this question.

8-A. If yes, specify the alternate level of education required:

n/a.

9. Is a foreign educational equivalent acceptable?

The petitioner listed "yes" that a foreign educational equivalent would be accepted.

6. Experience: 60 months in the position offered.

10. Is experience in an alternate occupation acceptable?

The petitioner checked "yes" and stated that 60 months experience in alternate occupation required.

10.B. Identify the job title of the acceptable alternate occupation:

The petitioner stated "any related occupation."

14. Specific skills or other requirements: Must have professional experience with: UNIX system administration and software development; OSX/BSD; RHELS; SOLARIS; Perl; Python; Network Appliance products and software; SAN NAS; Nagios or BigBrother; TCP/IP. Professional experience must be post-baccalaureate and progressive in nature.

The regulation at 8 C.F.R. § 204.5 additionally states in pertinent part:

> (g) *Initial Evidence*-(1) *General.* . . . Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.[3]

[3] Relevant to five years of progressive experience in the specialty following a baccalaureate degree, the regulation at 8 C.F.R. § 204.5(k) provides in relevant part:

The record contains a copy of the beneficiary's Electrical and Industrial Computer Science Engineering diploma from the obtained in 2003, as well as a copy of the beneficiary's engineering diploma from the obtained on September 21, 2006. A credentials evaluation submitted by the petitioner found that the combination of these two courses of study is the U.S. equivalent of a Bachelor of Science degree in Computer Engineering. It is unclear why the beneficiary claimed on Part J of the ETA Form 9089 that his bachelor's degree was obtained in 2003 from the and completely omits the diploma from the This raises a question as to the beneficiary's U.S. educational equivalency.[5] Moreover, the petitioner

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(3) *Initial Evidence.* The petition must be accompanied by documentation showing that he alien is a professional holding an advanced degree or an alien of exceptional ability in the sciences, the arts, or business.

(i) To show that he alien is a professional holding an advanced degree, the petition must be accompanied by:

(A) An official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree; or

(B) An official academic record showing the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post -baccalaureate experience in the specialty.

[4] The credentials evaluation submitted by the petitioner performed by stated that the beneficiary's studies at the were only the U.S. equivalent of two years of undergraduate study.

[5] In order to have experience and education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" of a United States baccalaureate degree. *See* 8 C.F.R. § 204.5(k)(2).

The beneficiary's degree must also be from a college or university. The regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) requires the submission of an "official academic record showing that the beneficiary has a United States baccalaureate degree or a foreign equivalent degree." For classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires the submission of "an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study." The AAO cannot conclude that the evidence required to demonstrate that a beneficiary is an advanced degree professional is any less than the evidence required to show that the beneficiary is a professional. To do so would undermine the congressionally mandated classification scheme by allowing a lesser evidentiary standard for the more restrictive visa classification. *See Silverman v. Eastrich Multiple Investor Fund, L.P.*, 51 F. 3d 28, 31 (3rd Cir. 1995) *per APWU v. Potter*, 343 F.3d 619, 626 (2nd Cir. Sep 15, 2003) (the basic tenet of statutory construction, to give effect to all provisions, is equally applicable to regulatory construction). Moreover, the commentary accompanying the proposed advanced degree professional regulation specifically states that a "baccalaureate means a bachelor's degree received *from a college*

has failed to submit any grade transcripts supporting the claim that he has the equivalent of a U.S. baccalaureate degree. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). Because the AAO concurs with the director's decision pertinent to the beneficiary's eligible experience as set forth below, the issue of academic equivalency will not be further discussed. In any further filings however, this should be clearly addressed.

As noted by the director, based on the claim that September 21, 2006 was the date that a Bachelor's degree was achieved, only post-baccalaureate experience obtained after this date would be considered. As set forth on Part K of the ETA Form 9089, the beneficiary claims the following jobs in this period of time:

1. He claims to have worked as a [redacted] from February 1, 2006 to October 31, 2008, which is equivalent to approximately 33 months of eligible work experience.
2. The beneficiary claims to have worked for [redacted] in [redacted] from November 1, 2008 to September 30, 2010, which is equivalent to approximately 23 months of eligible work experience.
3. From October 4, 2010 to the present (September 9, 2012 date of signing the ETA Form 9089), the beneficiary indicates that he has worked as a systems administrator for the petitioner.

Pursuant to regulatory requirements at 8 C.F.R. § 204.5(k)(3)(i)(B), the petitioner submitted employment verification letters from [redacted] confirming his employment experience with those firms. The petitioner also submitted a letter, dated November 27, 2012, from [redacted] a site reliability tools manager confirming the beneficiary's employment with the petitioner as a systems administrator and describing the beneficiary's job duties, which are identical to the job duties of the proffered position.

As set forth by the director and at 20 C.F.R. § 656.17, in general, experience gained with the petitioner may be used to qualify the beneficiary for the offered position only if the experience was not substantially comparable to the proffered position.[6] In this case, the beneficiary's experience as

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or university, or an equivalent degree." (Emphasis added.) 56 Fed. Reg. 30703, 30706 (July 5, 1991).

[6] The regulation at 20 C.F.R. § 656.17 states:

> (h) *Job duties and requirements.* (1) The job opportunity's requirements, unless adequately documented as arising from business necessity, must be those normally required for the occupation

a systems administrator working for the petitioner is identical to that of the position described in the ETA Form 9089. Therefore, this experience cannot be used to qualify the beneficiary for the offered position of systems administrator. As noted by the director, the petitioner has not established that

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. . . .

(4)(i) Alternative experience requirements must be substantially equivalent to the primary requirements of the job opportunity for which certification is sought; and

(i) If the alien beneficiary already is employed by the employer, and the alien does not meet the primary job requirements and only potentially qualifies for the job by virtue of the employer's alternative requirements, certification will be denied unless the application states that any suitable combination of education, training, or experience is acceptable.

(ii) *Actual minimum requirements.* DOL will evaluate the employer's actual minimum requirements in accordance with this paragraph (i).

(1) The job requirements, as described, must represent the employer's actual minimum requirements for the job opportunity.

(2) The employer must not have hired workers with less training or experience for jobs substantially comparable to that involved in the job opportunity.

(3) If the alien beneficiary already is employed by the employer, in considering whether the job requirements represent the employer's actual minimums, DOL will review the training and experience possessed by the alien beneficiary at the time of hiring by the employer, including as a contract employee. The employer can not require domestic worker applicants to possess training and/or experience beyond what the alien possessed at the time of hire unless:

(i) The alien gained the experience while working for the employer, including as a contract employee, in a position not substantially comparable to the position for which certification is being sought, or

(ii) The employer can demonstrate that it is no longer feasible to train a worker to qualify for the position.

(4) In evaluating whether the alien beneficiary satisfies the employer's actual minimum requirements, DOL will not consider any education or training obtained by the alien beneficiary at the employer's expense unless the employer offers similar training to domestic worker applicants.

(5) For the purpose of this paragraph(i)

(i) The term "employer means an entity with the same Federal Employer Identification Number (FEIN), provided it meets the definition of an employer at § 656.3.

(ii) A "substantially comparable" job or position means a job or position requiring performance of the same job duties more than 50 percent of the time. This requirement can be documented by furnishing position descriptions, the percentage of time spent on the various duties, organization charts, and payroll records.

the beneficiary acquired sixty months of post-baccalaureate experience and would not, therefore, qualify as a second preference advanced degree professional.

On appeal, the petitioner, through counsel, does not dispute that the beneficiary gained substantially comparable (identical) employment experience with the petitioner as compared to the offered position, but asserts that USCIS does not have the authority to use DOL regulations or Board of Alien Labor Certification Appeals (BALCA) cases to determine whether a beneficiary has met the employment experience requirements in the adjudication of a Form I-140 petition.

USCIS has the authority with regard to determining an alien's qualifications for preference status and the authority to investigate under section 204(b) of the INA, 8 U.S.C. § 1154(b). As noted above, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also*, *Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). Moreover, Department of Homeland Security and as its sub-agency, USCIS, have been given authority to investigate possible misrepresentation in connection with the labor certification program pursuant to 20 C.F.R. §656.31. It is noted in this matter that in response to question J.21 on the ETA Form 9089, which asks, "Did the alien gain any of the qualifying experience with the employer in a position substantially comparable to the job opportunity requested?," the petitioner answered "no." As discussed herein, the record shows that the answer to this question should have been "yes." Additionally, while BALCA cases may not be binding on USCIS, they still may offer guidance in adjudicating employment-based petitions based upon a labor certification. In this case, the AAO concurs with the director in finding that the terms of the labor certification submitted in support of the employment-based petition for an advanced degree profession have not been met. Employment experience with the petitioner in the identical position as the job offered may not be considered in this case. Therefore, the beneficiary does not possess the required sixty months of post-baccalaureate experience as a systems administrator in order to qualify as a second preference advanced degree professional.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.